

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)	
)	
Inter-Carrier Compensation)	CC Docket No. <u>99-68</u>
For ISP-Bound Traffic)	
)	
Implementation of the Local Competition Provisions)	CC Docket No. 96-98
In the Telecommunications Act of 1996)	

**COMMENTS OF RCN TELECOM SERVICES, INC.
AND CONNECT COMMUNICATIONS CORPORATION**

RCN Telecom Services, Inc. ("RCN"), and Connect Communications Corporation ("Connect"), by undersigned counsel, hereby submit their comments in response to the Public Notice issued on June 23, 1999.¹ In the Public Notice, the Commission sought comment on the issues identified by the United States Court of Appeals for the District of Columbia Circuit in its decision vacating and remanding the Commission's *Reciprocal Compensation Ruling*.²

RCN and Connect have previously provided comments to the Commission on many of the issues raised in the Public Notice, and will not repeat them now.³ RCN and

¹ *Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit*, CC Docket Nos. 96-98, 99-68, Public Notice (rel. Jun. 23, 2000).

² *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir 2000), *vacating* Declaratory Ruling, *Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*").

³ See Comments and Reply Comments of RCN Telecom Services, Inc., *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68 (Apr. 12, 1999; Apr. 27, 1999); See Brief of Petitioner MCI WorldCom, Inc. and Supporting Intervenors, *Bell Atlantic Telephone Companies v. FCC*, Case No. 99-1094, D.C. Cir. (Jun. 7, 1999); Comments and Reply Comments of RCN Telecom Services, Inc. and Connect Communications Corporation, *Deployment of Wireline Services Offering Advanced*

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Connect, therefore, would like to take this opportunity to discuss how the *Bell Atlantic* decision and the Supreme Court's *AT&T Corp. v. Iowa Utilities Board*⁴ decision have significantly expanded the Commission's jurisdiction over intrastate communications. As a result, the Commission may rule that dial-up traffic to Internet service providers ("ISPs") is subject to reciprocal compensation obligations under the Telecom Act without conceding that Internet communications are not subject to its jurisdiction.

I. THE COMMISSION'S JURISDICTION PRIOR TO THE 1996 TELECOM ACT WAS LIMITED TO INTERSTATE COMMUNICATIONS

Prior to passage of the Telecommunications Act of 1996, the Commission's jurisdiction was limited to interstate and foreign communication by wire or radio.⁵ The Commission was fenced off from "jurisdiction with respect to...intrastate communication service."⁶ To determine jurisdiction, the Commission conducted an "end-to-end" analysis of the communication where the ends were the geographic locations of the called and the calling parties.⁷

In some cases, the Commission asserted jurisdiction over intrastate services on the grounds that federal law preempted state law.⁸ A federal agency acting within the

Telecommunications Capability, CC Docket No. 98-147 (Sep. 24, 1999; Oct. 1, 1999). RCN and Connect incorporate these comments by reference.

⁴ *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

⁵ 47 U.S.C. §151.

⁶ *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 360, 370 (1986); 47 U.S.C. §152(b).

⁷ See, e.g., *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997).

⁸ *Louisiana Public Service Commission*, 476 U.S. at 368.

scope of its congressionally delegated authority may preempt state regulation.⁹ Defining the boundaries of federal jurisdiction apart from state jurisdiction has been an ongoing exercise as new technologies and services have emerged.

II. THE TELECOMMUNICATIONS ACT OF 1996 SIGNIFICANTLY EXPANDED THE COMMISSION'S JURISDICTION OVER INTRASTATE SERVICES

The Telecommunications Act of 1996 “fundamentally restructures local telephone markets.”¹⁰ In connection with this restructuring, additional authority was delegated to the Commission by Congress. States challenged this additional authority and the rules issued by the Commission implementing the local competition provisions of the Act. According to the Supreme Court, “The basic attack was jurisdictional.”¹¹ States asserted that Section 152(b) of the Communications Act of 1934 precluded the Commission from asserting intrastate authority under the Act to issue rules regarding local competition. The United States Court of Appeals for the Eighth Circuit agreed, ruling that Section 152(b) “remains a *Louisiana* built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states’ intrastate turf.”¹²

The Supreme Court reversed the Eighth Circuit. The Supreme Court ruled that Section 201(b) granted the Commission the authority to promulgate rules to implement the provisions of the Communications Act, including Sections 251 and 252 of the

⁹ *Id.* at 369.

¹⁰ *AT&T Corp v. Iowa Utilities Board*, 119 S.Ct. 721, 726 (1999).

¹¹ *Id.* at 728.

¹² *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997).

Telecom Act: “We think that the grant in §201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§251 and 252, added by the Telecommunications Act of 1996.”¹³ As a result, the Commission has jurisdiction over intrastate telecommunications to the extent necessary to implement local competition.

The nuances of this holding were recognized and debated by the Supreme Court. In a number of exchanges with the dissenting Justices in the Opinion, Justice Scalia, writing for the majority, made clear that the jurisdictional framework governing telecommunications has been changed. In response to Justice Breyer’s concern that there must be clear and manifest showing of congressional intent to supplant traditional state regulatory authority, Justice Scalia wrote, “But the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*”¹⁴

Further, Scalia said, “Nor do we agree with Justice Thomas that our interpretation renders §152(b) a nullity. . . . After the 1996 Act, §152(b) may have less practical effect. But that is because Congress, *by extending the Communications Act into local competition, has removed a significant area from the States’ exclusive control.*”¹⁵

In addition, Justice Scalia recognized that the regulatory scheme created by the Act is “decidedly novel.” That scheme is one “*in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas*

¹³ *AT&T Corp.*, 119 S.Ct. at 730.

¹⁴ *Id.* at n.6 (emphasis added).

(ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions which – within the broad range of lawful policymaking left open to administrative agencies – are beyond federal control.”¹⁶ Indeed, 33 states have already determined the policy implications of reciprocal compensation for ISP-bound traffic by ruling that such compensation is owed for traffic to ISPs.

Thus, the traditional test for Commission jurisdiction has been supplemented. Not only does the Commission have jurisdiction over all interstate and foreign communications by wire or radio, but it also has jurisdiction over telecommunications related to Sections 251 and 252 of the Act. Regardless of whether ISP-bound communications are jurisdictionally interstate, the Commission may rule that communications between an end user and an ISP are subject to the reciprocal compensation provisions of Section 251. The end-to-end analysis at issue in the Commission’s *Reciprocal Compensation Ruling* is simply not relevant to the question whether reciprocal compensation is owed for traffic to ISPs.

III. SECTIONS 251 AND 252 MAY APPLY TO INTERSTATE AS WELL AS INTRASTATE COMMUNICATIONS

As the Commission has recognized, Sections 251 and 252 of the Act apply to both interstate and intrastate telecommunications, extend federal jurisdiction to intrastate

¹⁵ *Id.* at n.8 (emphasis added).

¹⁶ *Id.* at n.10 (emphasis added). The expansion of the Commission’s jurisdiction has limits, however: “The Commission could not, for example, regulate any aspect of intrastate communications *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission’s primary jurisdiction.” *Id.* at n. 8 (emphasis in original). The issue in this proceeding – the payment of reciprocal compensation under Section 251(b)(5)-- *is* governed by the 1996 Act, so it clearly lies within the Commission’s jurisdiction.

matters, and expand state jurisdiction to interstate matters. The Commission has stated that “[t]he 1996 Act alters [the historical regulatory] framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues.”¹⁷ Accordingly, the Commission has held that “section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements.”¹⁸ Likewise, “we find that the states’ authority pursuant to section 252 also extends to both interstate and intrastate matters.”¹⁹ Thus, any ruling of the Commission implementing sections 251 and 252 would be applicable to all telecommunications, without regard to jurisdiction. Even if ISP-bound communications are jurisdictionally interstate, they may be subject to sections 251 and 252, including the obligation to pay reciprocal compensation under Section 251(b)(5).

In addition, “local” is not a jurisdictional classification, it is a service category. There may be interstate local exchange service in addition to intrastate local exchange service. The Commission should rule that ISP-bound traffic terminates at the ISP for purposes of Section 251, and also qualifies as local service whether or not it is interstate or intrastate.

¹⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part*, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev’d in part, aff’d in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (“*Local Competition Order*”) at ¶ 83.

¹⁸ *Id.* at ¶ 84.

¹⁹ *Id.*

IV. THE D.C. CIRCUIT HAS UNDERSCORED THE EXPANSION OF THE COMMISSION'S JURISDICTION

In *Bell Atlantic*, the D.C. Circuit vacated the *Reciprocal Compensation Ruling* on the grounds that the Commission had failed to explain how its “end-to-end” analysis was applicable in the context of reciprocal compensation payments to local exchange carriers for handling ISP-bound traffic.²⁰ The Court effectively acknowledged that the regulatory treatment of a particular service did not depend upon the jurisdictional nature of the service. By doing so, the Court has recognized the ability of the Commission to assert jurisdiction over Internet communications as interstate services, while regulating component parts of Internet communications as local or intrastate services.

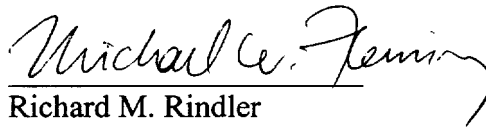
This position bolsters the Commission's authority to rule that ISP-bound traffic, regardless of jurisdiction, is eligible for reciprocal compensation payments as local traffic under the Act. The Supreme Court has ruled that the Commission may implement rules in connection with Sections 251 and 252 of the Act, regardless of jurisdiction of the underlying service, and the D.C. Circuit has indicated its consent to a Commission rule that bifurcates component parts of Internet communications for regulatory purposes. Consequently, for regulatory purposes, the Commission may now rule that telecommunications “terminate” at the ISP for purposes of reciprocal compensation under Section 251 and such calls are to be treated as local service, whether or not Internet communications are jurisdictionally interstate.

²⁰ *Bell Atlantic*, 206 F.3d at 5.

V. CONCLUSION

In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court recognized that the Telecom Act expanded the Commission's jurisdiction to include intrastate services implicated by Sections 251 and 252 of the Act. Therefore, in the context of implementing the local competition provisions of the Act, the Commission may regulate intrastate as well as interstate communications. In *Bell Atlantic v. FCC*, the D.C. Circuit acknowledged that the Commission's traditional jurisdictional analysis did not dictate the regulatory treatment for a particular service. Taken together, the Commission may rule that local telecommunications to ISPs are eligible for reciprocal compensation under Section 251, while retaining jurisdiction over interstate Internet communications.

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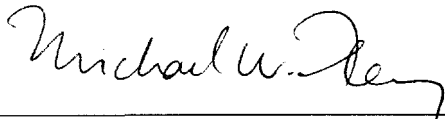
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2000, the foregoing Comments of RCN Telecom Services, Inc. and Connect Communications Corporation was served by hand delivery to the following:

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